

**IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA**

SIERRA CLUB, INC.,

Plaintiff,

v.

CASE NO.

UNIVERSITY OF FLORIDA,

Defendant,

_____ /

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

COMES NOW, Plaintiff, SIERRA CLUB, INC. pursuant to Fla. Stat. §119.07 and Florida's Constitution Article I, Section 24(a) file this complaint for Declaratory and Injunctive Relief against the Defendant, UNIVERSITY OF FLORIDA (hereinafter the "University"), and allege as follows:

Introduction

1. This is an action seeking declaratory, injunctive, and other relief for violations of the Florida Government-In-The-Sunshine law and the Public Records Act Chapter 119, Florida Statutes, by agents of the University. Plaintiffs contend that Defendant has withheld certain scientific documentation and other public records from review by Plaintiff.

Jurisdiction and Venue

2. This Court has jurisdiction under Article I, Sect. 24 of the Florida Constitution and §119.07, Florida Statutes.

3. Defendant maintains an Extension Education Program in Broward County in Urban Horticulture (UF-IFAS). Whereas the, "UF-IFAS/Broward County Urban Horticulture formulates implementation policy for the UF IFAS Florida Yards and Neighborhood residential and commercial developments in Broward County."

4. The Defendant maintains a University campus and academic degree programs in Environmental Horticulture, Plant Pathology, and Turfgrass Science in Davie, Broward County, Florida at Ft. Lauderdale Research and Education Center 3205 College Ave., Davie, FL 33314-7799.

5. Defendant's employee and co-author of the publications at issue in this case, John L. Cisar, Professor, Turfgrass and Water management maintains his principal place of business in Davie, Broward County, Florida at the University Campus located at 3205 College Ave., Davie, FL 33314-7799.

6. Venue properly lies in the Seventeenth Judicial Circuit, Broward County, Florida, pursuant to Section 47.011, Florida Statutes, whereas both parties are corporate entities maintaining places of business located in the aforesaid county.

Parties

7. Plaintiff, the SIERRA CLUB, INC., is a Florida not-for-profit corporation which promotes awareness and environmental preservation. Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth and to educate and enlist humanity to protect and restore the quality of the natural and human environment.

8. Defendant, the UNIVERSITY OF FLORIDA, is a Florida public university, created and authorized pursuant to the laws of the State of Florida and is subject to the provisions of the Government in the Sunshine and Public Records Laws.

Statutory and Regulatory Framework

9. Article I, Section 24(a) Florida's Constitution states in pertinent part:

“Every person has a right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this constitution.”

10. Fla. Stat. §119.07, Inspection and copying of records; photographing public records; fees; exemptions states in its pertinent parts:

11. Fla. Stat. §119.07(1)(a) Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time under reasonable conditions, and under supervision by the custodian of the records.

12. Fla. Stat. §119.07(1)(d) A person who has custody of a public record who asserts that an exemption applies to a part of such record shall redact that portion of the record to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and copying.

13. Fla. Stat. §119.07(1)(e) If the person who has custody of a public record contends that all or part of the record is exempt from inspection and copying, he or she

shall state the basis of the exemption that he or she contends is applicable to the record, including statutory citation to an exemption created or afforded by statute.

14. Fla. Stat. §119.07(1)(f) If requested by the person seeking to inspect or copy the record, the custodian of records shall state in writing and with particularity the reasons for the conclusion that the record is exempt or confidential.

15. Fla. Stat. §119.07(1)(g) In any civil action in which an exemption to this section is asserted, if the exemption is alleged to exist under or by virtue of §119.07(1)(d) or (f), (2)(d), (e) or (f) or (4)(c), the public record or part thereof in question shall be submitted to the court for an inspection in camera. If an exemption is alleged to exist under or by virtue of s. 119.07(2)(c), an inspection in camera is discretionary with the court. If the court finds that the asserted exemption is not applicable, it shall order the public record or part thereof in question to be immediately produced for inspection or copying as requested by the person seeking such access.

16. Fla. Stat. §119.07(4) The custodian of public records shall furnish a copy or a certified copy of the record upon payment of the fee prescribed by law. If a fee is not prescribed by law, the following fees are authorized:

17. Fla. Stat. §119.07(4)(a) 1 Up to 15 cents per one-sided copy for duplicated copies of not more than 14 inches by 8 1/2 inches; 2. No more than an additional 5 cents for each two-sided copy; and 3. For all other copies, the actual cost of duplication of the public record.

18. Fla. Stat. §119.07(4)(d) If the nature or volume of public records requested to be inspected or copied pursuant to this subsection is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by

personnel of the agency involved, or both, the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required, or both.

19. Fla. State §119.07(4)(e)1 Where provision of another room or place is necessary to photograph public records, the expense of providing the same shall be paid by the person desiring to photograph the public records.

20. Fla. State §119.07(4)(e)2 The custodian of public records may charge the person making the photographs for supervision services at a rate of compensation to be agreed upon by the person desiring to make the photographs and the custodian of public records. If they fail to agree as to the appropriate charge, the charge shall be determined by the custodian of public records.

21. Fla. Stat. §119.11 Accelerated hearing; immediate compliance states:

22. Fla. Stat. §119.11(1) Whenever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases.

23. Fla. Stat. §119.12 Attorney's fees—If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees.

24. The University is a public body under the Government in the Sunshine Law. Public bodies such as the University cannot maintain public records in confidentiality out of the public eye, except in very limited and narrow circumstances. Wood v. Marston, 442 So. 2d 934 (Fla. 1983).

Facts

25. The University's Institute of Food and Agricultural Sciences (IFAS) originally published SL 283, Unintended Consequences Associated with Certain Urban Fertilizer Ordinances and ENH 1115, Frequently Asked Questions about Landscape Fertilization for Florida-Friendly Landscaping Ordinances in March 2009. Such publications identified new fertilization standards and promoted revision of local ordinances with regard to nitrogen and phosphorous.

26. Such publications have been and are currently relied on by government agencies throughout the state.

27. Following a series of electronic mail correspondence between Sierra Club and the University, Sierra Club, via Regional Representative Cris Costello, submitted a public records request, July 29, 2010 to the University, via employees or agents Terril A. Neil and Jack M. Payne. (Attachment A).

28. The public record request stated in its pertinent part "I hereby submit a public records request for the names, titles, and contact information and their respective reviews made prior to publication for SL 283 and ENH 1115." (Attachment A).

29. The public records request went unanswered and on August 13, 2010 was resubmitted by Sierra Club, via Regional Representative Cris Costello to the University, via employee or agent Janine Sikes. (Attachment B).

30. The request stated:

31. I hereby request the “science upon which” the urban “fertilizer management recommendations” in the “state model ordinance” are based; this includes:

32. [1]... A. The scientific literature that suggests a 3-foot fertilizer zone is superior to a 10-foot fertilizer-free zone for keeping fertilizer from running into surface water bodies;

33. B. The scientific literature that suggests no storm water runoff of applied fertilizer nutrients occurs unless a rainfall of 2 inches or more falls within a 24-hour period’

34. C. The scientific literature that suggests 30% slow/controlled release fertilizer is more or equally protective of water quality than 50% or higher slow/controlled release fertilizer;

35. D. The scientific literature that suggests the FDEP Model “Prohibited Application Period” can be followed to the extent that fertilizer will not be applied before or during a rainfall event that produces enough runoff to carry applied nutrients from a landscape.

36. [2] “I hereby request the documentation, including email and hard copy correspondence, upon which the contradiction between Terril Nell’s and George Hochmuth’s policy recommendations regarding urban fertilizer management and the current FYN Florida-friendly landscaping fertilization recommendations is based. This will include correspondence between Nell and Hochmuth and representatives of the turfgrass, landscape maintenance, nursery growers, fertilizer and pest control industries,

the retail federation, FDACS, FDEP and any and all state senators, representatives and legislative aides relating to the following publications and processes:

37. a. The revision of the *2008 Florida Friendly Best Management Practices for Protection of Water Resources by the Green Industries* (BMP Manual);

38. b. The drafting of the 2008 Model Ordinance for Florida-Friendly Fertilizer Use on Urban Landscapes;

39. c. The drafting of SL283: *Unintended Consequences Associated with Certain Urban Fertilizer Ordinances*;

40. d. The drafting of ENH 1115: *Frequently Asked Questions about Landscape Fertilization for Florida-Friendly Landscaping Ordinances*;

41. e. The drafting of the *Florida's Urban Landscape Water Quality Research Consortium* mission statement, research priorities, and discussion paper;

42. f. The drafting of 2009 Senate Bill 494 and 2010 Senate Bill 382/House Bill 1445; and

43. g. The 2010 revision of the Model Ordinance for Florida-Friendly Fertilizer Use on Urban Landscapes;”

44. [3] “I hereby request the names, titles and contact information for all the internal and external reviewers of the 2009 IFAS (EDIS) publications SL 283 *Unintended Consequences Associated with Certain Urban Fertilizer Ordinances* and ENH 1115 *Frequently Asked Questions about Landscape Fertilization for Florida-Friendly Landscaping Ordinances*, and their respective reviews done prior to the original publication of SL 283 and ENH 1115.”

45. [4] “I hereby request the names, titles and contact information for all the internal and external reviewers of SL 283 *Unintended Consequences Associated with Certain Urban Fertilizer Ordinances*, and their respective reviews done after the original publication of SL 283.”

46. On August 19, 2010, the Sierra Club, per the request of employee or agent Ms. Sikes refined the public records request with regard to request number 2 above and restated it as follows: (Attachment C).

47. “All email or hard copy correspondence from June 2008 to the present between (to and from) George Hochmuth, Terril Nell, Erica Santella, Michael Thomas (FDEP), Chris Wible, Steven Kelly, Jim Spratt, Barry Troutman, Mary Hartney, Allen Fugler, James Skillen, Betsy McGill, Hugh Gramling, Ben Bolusky and Chuck Aller.”

48. The University’s Office of the Vice President and General Counsel responded to the request on September 9, 2010, stating in pertinent part: (Attachment D).

49. “I am following up on your public records requests and our telephone conversation last week. You asked for whatever responsive information we could provide as soon as possible, especially regarding the documents and information I explained are not actually public records subject to disclosure under the Florida Public Records Act.”

50. “In response to your requests numbered 3 and 4 [paragraphs 39 and 40 of this complaint] in your August 13, 2010, email to Janine Sikes, any documents that might have names, titles, contact information, and reviews of the reviewers of the two EDIS publications, “Unintended Consequences Associated with Certain Urban Fertilizer Ordinances” and “Frequently Asked Questions about Landscape Fertilization for Florida-

Friendly Landscaping,” **are not public records.** Therefore, the University is not providing documents to you in response that these requests.” (Attachment D).

51. On September 22, 2010 Janine Sikes emailed a cost estimate for fulfilling a portion of the public records requested, “All email or hard copy correspondence from June 2008 to present between (to and from) George Hochmuth, Terril Neil, Erica Santella, Michael Thomas (FDEP), Chris Wible, Steven Kelly, Jim Spratt, Barry Troutman, Mary Hartney, Allen Fugler, James Skillen, Betsy McGill, Hugh Gramling, Ben Bolusky and Chuck Aller.” (Attachment E).

52. “Dr. Nell and Dr. Hochmuth report that your request would require an extensive amount of staff time to produce. As a result, the following is the cost estimate to provide you (Plaintiff) with the documents you request:”

53. “42,180 pages @ \$0.10 per page = \$4,218 and 180 hours @ \$10/hour = \$1,800. Total estimated cost = \$6,018.”

54. “Additionally these emails will require inspection by the general counsel’s office to ensure no protected or other exempt information is released. Attorney time charged is at \$89.61/hour and is estimated at 200 hours.”

55. “We require a check for the entire amount before we begin producing these documents. If this is an overestimate, the University will refund the difference. If it is an underestimate, the University will invoice the difference and may require additional payment to complete the response. Please provide payment payable to the University of Florida in the amount of \$23,940.”

56. In January 2011, The University subsequently revised and republished the aforementioned report, “Urban Water Quality and Fertilizer Ordinances: Avoiding Unintended Consequences: A Review of the Scientific Literature.”

57. June 9, 2011 The Law Firm of Robert N. Hartsell, P.A. submitted a records request on behalf of the Sierra Club, specifically requesting those records and documents relied upon by the University in publishing SL 283 and ENH 1115 and that information relied upon by the University in responding to Cris Costello’s public records request (Attachment E) .

58. The request included the following:

59. “Any and all documents, meeting logs, meeting minutes, studies, opinions, models, data, analysis, notes, calendars, objections, transcripts and/or communications, videos, audio recordings, internal memos, staff reports, e-mails or other correspondence to and/or from University of Florida staff, agents, private entities, public entities and/or officials which identify, pertain to, discuss and/or substantiate the quantity of documents, costs and calculations of costs for the production of public records requested of the University by Cris Costello on August 13, 2010 and clarified on August 18, 2010.”

60. “Any and all documents, meeting logs, meeting minutes, studies, opinions, models, data, analysis, notes, calendars, objections, transcripts and/or communications, videos, audio recordings, internal memos, staff reports, e-mails or other correspondence to and/or from University of Florida staff, agents, private entities, public entities and/or officials which identify, pertain to, and/or discuss the September 9, 2010 denial of public records request numbered 3 and 4.”

61. “Any and all emails and/or correspondence to and/or originating from Janine Sikes, Dr. Nell and/or Dr. Hochmuth from August 13, 2010 through the date of this request regarding the public records requested of the University by Cris Costello on August 13, 2010 and clarified on August 18, 2010.”

62. The names, titles and contact information for all internal and external reviewers of the 2011 revision of the IFAS (EDIS) publication SL 283, new title *Urban Water Quality and Fertilizer Ordinances: Avoiding Unintended Consequences: A Review of the Scientific Literature* (<http://edis.ifas.ufl/ss496>).”

63. “Any and all documents, meeting logs, meeting minutes, studies, opinions, models, data, analysis, notes, calendars, objections, transcripts and/or communications, videos, audio recordings, internal memos, staff reports, e-mails or other correspondence to and/or from County staff, private entities, public entities and/or officials which identify and pertain to the correspondence and scientific literature relating to the change in the IFAS (EDIS) FYN Checklist from *at least 30% slow release Nitrogen on turf* (in the 2009 checklist) to *at least 15% slow release Nitrogen on turf* (in the 2010 checklist)”

64. The University responded to the June 9, 2011 public records request on August 1, 2011 (Attachment F).

65. The University’s response reiterated their prior response, maintaining that the names, titles, and contact information for the reviewers of the 2011 revision of the referenced publication are not public records without citing specific statutory exemption as required by Chapter 119.07(1)(e).

66. The University further included a cost estimate for the production of those documents not deemed to be exempt of \$23,940.00.

67. The cost estimate is comprised of three elements: (1) 42, 180 pages at \$.10 per page, totaling \$4,218.00; (2) 180 hours at \$10.00 per hour, totaling \$1,800.00; and (3) 200 hours of attorney review at \$89.61 per hour, totaling \$17,922.00.

Count I [Public Records]

68. This action is against the University for declaratory relief, pursuant to Article 1, Section 24, Florida Constitution and Chapter 119, Florida Statutes.

69. The allegations of paragraphs 1-67 are re-alleged and incorporated herein by reference.

70. A dispute or controversy exists between the Plaintiff and the University regarding whether or not documents and information requested via Public Records Requests dated July 29, 2010, August 13, 2010, August 19, 2010, and June 9, 2011 were subject to the Florida Sunshine Law, public records requests are noted specifically above.

71. In that regard the University maintains that information and documents requested are not public records and as such not subject to disclosure, because “the reviews are an integral part of the process of research, study, and evaluation that goes into preparing the EDIS documents for publication an in order to maintain the integrity” and “objectivity of the academic research and publication process, University researchers have a strong interest in withholding disclosure of this type of record.”

72. Plaintiff, on the other hand, maintains that the records requested are public records as they were made or received in connection with the official business of the University and are subject to disclosure under the Florida Sunshine Law.

73. In claiming an exemption on the requested public records, the University has not cited specific statutory reference for their proposed exemption as is required under Chapter 119.07(1)(e).

74. Unless the Court declares the rights and obligations of the University in regard to such records, the Plaintiff and the public at large will suffer irreparable harm if in fact the University is violating the Sunshine Law by refusing to disclose such records, for which there is no adequate remedy at law.

WHEREFORE, Plaintiff respectfully requests the following relief:

75. Declaration that the records withheld by the Defendant are in fact public records.

76. Declaration that the Defendant, University, failed to comply with their statutory duty to permit the inspection and copying of public records;

77. An Order directing Defendant, University, to make the requested records available for inspection and copying by Plaintiff;

78. An Order awarding attorney's fees and costs for prosecuting this action; and

79. Any other relief the Court deems just and proper.

Count II [Public Records – Excessive Fees]

80. Plaintiff re-alleges paragraphs 1-78 and incorporated herein by reference.

81. This is an action seeking declaratory and injunctive relief pursuant to Article 1, Section 24, Florida Constitution and Chapter 119, Florida Statutes.

82. Defendant responded to Plaintiff's three requests for public records, specifically those requests detailed in the paragraphs above, and provided a cost estimate for obtaining such documents.

83. The cost estimate provided by Defendant was \$23,940.00, which included costs for production, personnel costs, and legal review by Defendant's attorney to determine whether the public records, where no exemption was claimed, contain any privileged information.

84. Plaintiff alleges that the cost estimate is not reasonable, as required under Chapter 119.07(4)(d), which provides, "...in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required, or both."

85. Plaintiff specifically sought in the records request dated June 9, 2011 [see paragraph 59 above] a detailed estimate and justification of the costs identified by Defendant in the amount of \$23,940.00, including support for the production of documents, staff/labor costs, and explanation of attorneys' fees for non-exempt records.

86. In Corden v. Chief of Police, 696 So. 2d 772, 773 (Fla. 2d DCA 1996), the court when considering a special service charge exceeding \$4,000.00 for staff time, stated that, "An excessive charge could well serve to inhibit the pursuit of rights conferred by the Public Records Act." The court in the Corden case held that, "Because section 119.07(1)(b), Florida Statutes (1995), requires special service charges to be "reasonable," the police chief should be required to explain in more detail the reason for the magnitude of the assessment."

87. In the instant case Defendant has not provided the Plaintiff with a detailed explanation of the cost estimate for producing the requested documents, which are exceedingly more expensive than those cited in the Corden case.

88. The Plaintiff maintains that the Defendant's cost estimate of nearly \$24,000.00 amounts to a denial of the request to review the aforementioned public records. The estimated costs associated with reviewing the public records are excessive in nature and such charges would only serve to extinguish the Plaintiff's rights conferred by the Public Records Act.

89. These excessive costs for reviewing emails exchanged and other regular business records and/or communications between public officials has a chilling effect upon any future public record request made to the Defendant.

90. Unless the Court declares the rights Plaintiff and obligations of the Defendant with regard to such records, the Plaintiff and the public at large will suffer irreparable harm if in fact the University is violating the Sunshine Law by refusing to disclose such records, for which there is no adequate remedy at law.

WHEREFORE, Plaintiff respectfully requests the following relief:

91. Declaration that the Defendant, University, failed to comply with their statutory duty to permit the inspection and copying of public records;

92. An Order directing Defendant, University, to make the requested records available for inspection and copying at a reasonable cost to Plaintiff;

93. An Order awarding attorney's fees and costs for prosecuting this action; and

94. Any other relief the Court deems just and proper.

Count III [Public Records – Attorneys Fees]

95. Plaintiff re-alleges paragraphs 1-93 and incorporated herein by reference.

96. This is an action seeking attorney's fees under Chapter 119.12, Florida Statutes, against the University.

97. Prior to filing this action Defendant, University, failed to comply with the request to permit inspection and copying of public records, by claiming an exemption without specific statutory reference.

98. Refusal to provide requested records was unlawful.

99. The Defendant, University, provided the Plaintiff with an unreasonable cost estimate for production and/or review of non-exempt public records, totaling nearly \$24,000.00.

100. Requiring the Plaintiff to pay exorbitant unreasonable fees in contradiction to Florida statute amounts to an unlawful refusal to provide requested records.

WHEREFORE, Plaintiff respectfully requests following relief:

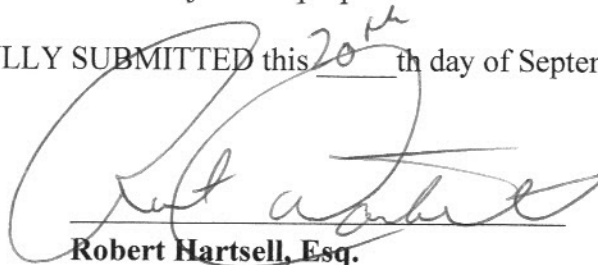
101. An accelerated hearing under Section 119.11(1) Fla. Stat.

102. A Declaration that the University failed to comply with its statutory duty to permit the inspection and copying of public records;

103. An Order awarding attorney's fees and costs for prosecuting this action; and

104. Any other relief the Court deems just and proper.

RESPECTFULLY SUBMITTED this 20th day of September, 2011.



Robert Hartsell, Esq.

Florida Bar No. 636207

Robert N. Hartsell, P.A.

2407 SE 14th Street
Pompano Beach, Florida 33062
Phone (954) 232-4889
Fax (954) 941-6462
Email Robert@hartsell-law.com